71-1440

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MICHAEL RODAK, JR.,

Supreme Court of the United States

October Term, 1971

DAVID WENGER,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION AND APPENDIX FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Supreme Court of the United States

October Term, 1971

DAVID WENGER,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION AND APPENDIX FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered March 6, 1972.

Opinion Below

The opinion of the Court of Appeals, not yet reported, is printed in the Appendix to this petition (A 1-10).* The final memorandum and order of the District Court for the Southern District of New York, dated October 25, 1971, was not reported; it is printed in full in the Appendix to this petition (A 11-12).

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on March 6, 1972 (A 13). A timely petition for rehearing *en banc* was denied by the

* Reference to the Appendix will be preceded by the letter "A".

panel and by the remainder of the Court on April 4, 1972 (A 14, 15), but an application for a stay of the mandate was granted subject to the provisions of Fed. R. App. P. 41(b) on the same day (A 14). This petition is being filed within thirty days of the date on which the petition for rehearing was denied. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) and Rule 22(2) of the Rules of the Supreme Court of the United States.

Questions Presented

1. Should this Court adopt the rule prevailing in several circuits that the lack of reference in a later federal sentence to an earlier federal sentence, if known by the later sentencing judge, renders the two sentences concurrent with each other?

2. Should this Court resolve an apparent conflict in the circuits concerning the rule of concurrency absent specific language to the contrary, whereby the Court of Appeals for the Second Circuit, in the decision below, has cast such a rule in terms of a "presumption" capable of rebuttal and all the other circuits which have passed on this issue have cast such a rule in terms of a substantive rule of sentencing incapable of rebuttal?

3. Should this Court let stand a decision by the court below rendering two federal sentences consecutive to each other, despite the fact that the judgments of conviction in the two prosecutions filed in the District Court do not so provide?

4. Does the fact that for a period of time Petitioner, the government, the Probation Department, and other District Judges mistakenly believed the two sentences to be consecutive to each other convert what would otherwise be concurrent sentences into consecutive sentences?

Rules Involved

Federal Rules of Criminal Procedure, Rule 36, clerical mistakes:

> "Clerical mistakes in judgments, orders or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court orders."

Rule 8(a), Joinder of Offenses:

> "Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan."

Statement of the Case

On May 27, 1968, Petitioner was named in the first of what was to be a total of six related indictments in the Southern District of New York charging him, as the accountant for the Central States, Southeast and Southwest Pension Fund (hereinafter, for convenience, "the Fund"), with receiving unlawful fees as an "agent" of the Fund in violation of Title 18, U.S.C., Section 1954 and with conspiracy so to receive in violation of Title 18, U.S.C., Section 371. Each indictment concerned Petitioner's role with respect to six loan applications processed through the Fund and charged the same violations which were based upon a series of "acts or transactions connected together or constituting parts of a common scheme or plan" (Fed. R. Crim. P. 8(a)). Although joinder of

offenses into one indictment would thus have been permitted under the Federal Rules of Criminal Procedure, the government, for reasons of its own, chose to proceed by separate indictments and separate trials (Cf. Fed. R. Crim. P. 13), the first of which resulting in the conviction of Petitioner in the Spring of 1970.

On June 5, 1970, Judge Harold R. Tyler, Jr., sentenced Petitioner to a term of imprisonment of 2 years, 3 months and imposed a fine totalling $10,000 which was fully paid. At the time of sentence, the court released Petitioner on bail in the amount of $5,000 pending appeal (A 16-17).

Petitioner appealed to the United States Court of Appeals for the Second Circuit, which affirmed this conviction in an opinion reported at 442 F.2d 498 (2d Cir. 1971). The Court of Appeals issued its mandate on August 11, 1971.

During the appellate process and while Petitioner was free on bail pending appeal, he was tried and convicted in the second indictment before Judge Milton Pollack. On December 21, 1970, Judge Pollack sentenced Petitioner to a term of imprisonment of two years and imposed fines totalling $10,000 which were fully paid. Although Judge Pollack was made aware of Petitioner's earlier sentence imposed by Judge Tyler, he chose not to refer to it either in open court or in the written judgment filed that day (A 18-19).

After he imposed sentence, Judge Pollack refused to grant bail pending appeal and ordered Petitioner to begin serving his sentence on January 4, 1971. Wenger surrendered on that day and has been incarcerated since that time.

Petitioner was tried and convicted for tax evasion before Judge Jack B. Weinstein in the Eastern District of

New York, who on April 23, 1971, after noting that it would have been unlikely that the facts of that case would have warranted criminal prosecution had not Petitioner been indicted and convicted in the Southern District of New York, sentenced Petitioner to three years probation, which he is currently serving, and imposed a fine of $7,500.

On June 16, 1971, the government filed a *nolle prosequi* as to one of the remaining indictments and subsequently Petitioner pleaded guilty to the remaining three indictments before Judge Charles M. Metzner, who on August 19, 1971, suspended the imposition of sentence, placed Petitioner on probation for a period of two years to follow completion of Judge Pollack's sentence and imposed fines totalling $15,000, which were fully paid.

On September 14, 1971, Petitioner moved before Judge Tyler for an order pursuant to Fed. R. Crim. P. 36 correcting the record in the case over which he presided. The error asserted in the moving papers concerned the failure of the record in Judge Tyler's case to reflect the fact Petitioner commenced serving the sentence imposed by Judge Tyler the same day he commenced serving the sentence imposed by Judge Pollack; in fact, the record of the District Court simply indicated that Petitioner remained free on bail pending appeal, despite the undisputed circumstance that by September, 1971, Petitioner had been incarcerated for eight months.

The motion was premised on the principle that since the sentences of Judges Tyler and Pollack were not specifically made consecutive to each other, they were concurrent with each other as a matter of law—a well-settled substantive principle of federal sentencing essentially recognized by the Court of Appeals, but a principle erroneously converted by the court into an "all but conclusive presumption" (A 3), which it felt free to refuse to apply to the facts of this case (A 5).

Reasons for Granting the Writ

1. The decision of the court of appeals is in conflict with decisions of other courts of appeals on the same matter and concerns an important question of federal law which has not been, and should be settled by this Court.

It was not disputed that in imposing sentence on Petitioner, Judge Pollack, although aware of the earlier sentence imposed by Judge Tyler, made no mention of the first sentence either in open court or in the written judgment filed that day. Petitioner urged the court below to rule that the two sentences were thus to be served concurrently with each other.

The precise issue presented a case of first impression for the Court of Appeals for the Second Circuit, although in *United States* v. *Chiarella*, 214 F.2d 838 (2d Cir.), *cert. denied*, 348 U.S. 902 (1954), the court had ruled that the failure of a sentencing judge specifically to render sentences imposed on more than one count of an indictment consecutive to each other rendered those sentences concurrent with each other. *Id.*, at 841.

The issue, although novel to the court below, has been, however, passed upon by various other courts of appeals which have invariably ruled that absent specific language rendering a later federal sentence consecutive to an earlier federal sentence, multiple sentences operate concurrently—a rule of sentencing invariably cast in terms of a substantive rule of law or in terms of a conclusive presumption* —but apparently never in terms, as in the decision below, of a rebuttable presumption. *See, e.g., Borum* v. *United States*, 409 F.2d 433, 439-41 (D.C. Cir. 1967), *cert. denied*, 395 U.S. 916 (1969); *Schultz* v. *United States*, 384 F.2d 374 (5th Cir. 1967); *Henley* v. *Heritage*, 337 F.2d 847, 848 (5th Cir. 1964); *Mills* v. *Hunter*, 204 F.2d 468, 470 (10th

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* A "conclusive preumption", of course, is essentially a substantive rule of law. See *Ellis* v. *Henderson*, 204 F.2d 173, 175 (5th Cir. 1953).

Cir. 1953); *Subas* v. *Hudspeth*, 122 F.2d 85, 86-7 (10th Cir. 1941); *Hode* v. *Sandford*, 101 F.2d 290, 291 (5th Cir. 1939); *McNealy* v. *Johnston*, 100 F.2d 280, 282 (9th Cir. 1938); *Downey* v. *United States*, 91 F.2d 223, 230 (D.C. Cir. 1937); *Odekirk* v. *Ryan*, 85 F.2d 313, 315 (6th Cir. 1936); *Aderhold* v. *McCarthy*, 65 F.2d 452 (5th Cir. 1933); *White* v. *Kwiatkowski*, 60 F.2d 264, 265 (10th Cir. 1932); *Biddle* v. *Hall*, 15 F.2d 840, 841 (8th Cir. 1926); *Puccinelli* v. *United States*, 5 F.2d 6, 7 (9th Cir. 1925).*

The court below, despite the rule of the other circuits, fashioned its rule in terms of a rebuttable presumption: the court held

> "that an *all but* conclusive presumption does exist in federal sentencing that unless otherwise stated a sentence imposed on a given count or indictment is concurrent with other federal sentences then imposed or previously imposed" (A. 3) (emphasis added).

The emphasized words—at first blush seemingly insignificant—simply are not part of the case law which forms the basis of this rule in the other circuits; the addition of these words clearly converted what has been held in the

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* The rule, however, does not apply if there is some evidence that the second sentencing judge in fact imposed a consecutive sentence, *Buie* v. *King*, 137 F.2d 495 (8th Cir. 1943) (written memorandum of clerk prepared contemporaneously with the sentence indicating that the sentences were consecutive), or if it was beyond the power of the second sentencing judge to impose a concurrent sentence, *United States* v. *Remus*, 12 F.2d 239 (6th Cir.), *cert. denied*, 271 U.S. 689 (1926) (one sentence required to have been served in a *jail*, the other, in a *penitentiary*).

The court below cited these cases as examples of judicial refusals to apply the "presumption" of concurrency (A 9); it is clear, however, that these cases are nothing more than exceptions to the normal rule—neither court even mentioned the word "presumption"—not relevant to the facts of this case.

other circuits to be a substantive rule into a sometimes rebuttable presumption, which permitted the court in this case erroneously, we submit, to find the presumption rebutted by circumstances not relevant to the precise issue at bar.

This Court has never explicitly passed on this issue, although a similar—albeit more technical—rule appears as *dictum in United States* v. *Daugherty*, 269 U.S. 360, 362-63 (1926). The cited case adopted the reasoning of an opinion written by Mr. Justice Bradley, sitting as Circuit Justice for what is now the Third Circuit, in *United States* v. *Patterson*, 29 Fed. 775 (3d Cir. 1887). The sentencing judge in *Patterson*, *supra*, stated in court that the several sentences on several indictments were "not to run concurrently." Mr. Justice Bradley construed the sentences to be concurrent because the sentencing judge had not specified the order in which the sentences were to be served consecutively. *Id.*, at 778. It is significant that the rule of *Patterson*, *supra*—and consequently the *dictum* of *Daugherty*, *supra*—is cast in terms of a substantive rule of law and not as a rebuttable presumption.

It is respectfully submitted that the decision of the court below conflicts with the rule of the other circuits—a conflict reconcilable only by this Court. Moreover, since the decision of the court below involves an important question of federal sentencing—a question likely to arise again—and since this Court has not yet specifically passed on this issue, it is respectfully urged that the writ be granted.

2. The decision below, in refusing to apply a substantive rule of law to concededly relevant facts so far departed from the accepted and usual course of such proceedings as to warrant the exercise by this Court of its supervisory power over federal judicial proceedings:

It is not an overstatement, we submit, to characterize the decision below as unusual—unusual because the substantive rule of law urged for by petitioner, that is, multi-

ple sentences operate concurrently absent specific language to the contrary. was adopted by the Court of Appeals—although erroneously recast in the terms of a rebuttable presumption—and found generally applicable to the two sentences at issue, while the court at the same time held that the sentences were consecutive and not concurrent."

With all due deference to the court below and without intending to sound pompous, we submit that the unusual nature of this opinion, aside from resulting in a manifest personal injustice to the Petitioner, raises fundamental questions as to the sanctity of the legal process—for the refusal of a court to permit a litigant the benefit of a concededly relevant, well-settled and long-standing legal principle, is totally inconsistent with the objective operation of the rule of law in our society.

The court below rationalized its affirmance of the District Court's order on two grounds; both of which, we submit, are incapable of surviving close analysis.

The first was said to be premised on "notions of estoppel": the court stated that in two subsequent sentencing proceedings the Petitioner

> "took the *position* that the first two sentences were consecutive and *used* that *assertion* to *persuade* those judges to impose no further prison terms. . . The real question is . . . whether a party . . . can take such *absolutely inconsistent positions* . . . before different federal judges and get the *benefit* of both" (A 9-10) (emphasis added).

It is true that prior counsel for Petitioner was under the mistaken impression—a mistaken impression shared by the prosecutors and Department of Probation officials—that the sentence of Judge Pollack was to be served consecutively to the sentence imposed by Judge Tyler, and so stated

to Judges Weinstein and Metzner at subsequent sentencing proceedings. But it is equally true that the question of the length of Petitioner's previous prison sentences is simply incapable of being termed a "position" and is even less capable of being "used" by a defendant to "persuade" a judge to do anything; the length of the Petitioner's previous prison sentences is a *fact*, not a "position," learned by the judge primarily from court records and the presentence report prepared by the Probation Department—invariably read by the judge prior to a defendant's appearance in court for sentence. In this context, then, there could not have been reliance by a judge on any statement by either counsel for the petitioner or counsel for the government as to the length of Petitioner's previous sentences. The fact that the judge, the government, the Probation Department, as well as Petitioner and his counsel were—all of them—mistaken as to their interpretation of the two previous sentences in reality goes precisely to the heart of the rationale of the rule of concurrency ironically adopted by the court below—"Official inadvertence works in favor of the defendant" (A 4)—rather than to the flatly contradictory notion opted for by the court that somehow only the Petitioner personally, who had nothing at all to do with the details of the imposition of the ambiguous sentences, is "estopped" from relying on that same official inadvertence.

The thought that Petitioner obtained some "benefit" or "advantage" because of the mistake of everyone concerned as to his two prior sentences is nothing but the rankest speculation. The use of the words "benefit" and "advantage" assumes that Judge Metzner, who accepted pleas of guilt to three of the indictments (after the Petitioner was convicted twice after trials and after one indictment was dismissed on motion of the government) *would* have (not even *might* have) imposed a consecutive sentence to the ones previously imposed if he had known that the

previous sentences were concurrent rather than consecutive.* Such an assumption flies in the face of the general aversion of judges to impose consecutive sentences even after trial, let alone after guilty pleas. Thus the "benefit" or "advantage" alluded to by the court is totally illusory, for if the court below thought it proper to speculate—as it did in its opinion—as to what might have been had the issue of concurrency been determined in Petitioner's favor prior to the sentences imposed by Judges Metzner and Weinstein, in reality it is more likely than not that the sentences they imposed would have been exactly the same as they were and Petitioner's total period of incarceration would be two years, three months, not four years, three months.

The vice of treating the rule of concurrency as a presumption capable of rebuttal is evident here, for this Court —and any other reviewing court—should not be placed in the position of speculating at all as to what might have been had there been no ambiguity with respect to Petitioner's first two sentences. The court below noted that one commendable rationale for the continued existence of the rule of concurrency is to require of the government "precision before a defendant can be jailed . . ." (A 5), and it can safely be assumed this Court would not be reading this petition had there been "precision" here.

Neither Petitioner nor any of his attorneys did anything which warranted the application of an estoppel, despite the Court of Appeals' holding to the contrary. Counsel for Petitioner who appeared before Judges Metzner and

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* Judge Weinstein was moved to admit at the time of sentence that he was doubtful that the facts of that case would *even have warranted criminal prosecution* had it not been for the fact that the defendant was named in six indictments in the Southern District of New York. It is therefore not even remotely likely that he would have sentenced Petitioner to an additional term of imprisonment had he known the previous Southern District sentences were concurrent rather than consecutive.

Weinstein in good faith thought the earlier sentences were consecutive as, in equal good faith, did the government and the Probation Department. Thus, all or none should be blamed for the mistake, not only the Petitioner.

The classic estoppel situation is where, by preconceived notion, a party urges one course of action and then, having won, urges that the course followed was incorrect and is grounds for reversal. *See, e.g., Roe* v. *United States*, 316 F.2d 617, 625 (5th Cir. 1963); *Edwards* v. *United States*, 265 F.2d 909, 910 (6th Cir.), *cert. denied*, 361 U.S. 845 (1959). But as Petitioner was not himself alone in construing these sentences as consecutive, rather having been only one of many to have made this error, and since there was no "preconceived notion" to take "inconsistent positions" before anyone, he did nothing which warranted an estoppel.

The unfairness of the result is aggravated, not diminished, by the second ground relied upon by the court to deny the applicability of the rule of concurrency and that is that at the time of the two sentences, and for a period thereafter, Petitioner "knew he had been sentenced to two years and three months by Judge Tyler and two *more* years by Judge Pollack" (A 9) (emphasis in original). Of course, he "knew" or assumed what everyone else—lawyers, government officials, judges, all with far more expertise in this area than he—knew or assumed—that the sentences were thought to be consecutive. Certainly, Petitioner's mistaken knowledge, especially because it was knowledge gained from government officials and other experts in a better position to know, cannot form a basis for denying Petitioner the benefit of a rule of law which everyone involved *should* have known.

In sum, the court below refused to apply a well-settled rule of law to indisputably relevant facts; such a decision is so totally inconsistent with the impartial administration of justice in our society, that this case warrants review by this Court.

CONCLUSION

Under all the circumstances herein set forth, it is respectfully prayed that a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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APPENDIX

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APPENDIX A

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 476—September Term 1971.

(Argued January 21, 1972 Decided March 6, 1972.)

Docket No. 71-2130

UNITED STATES OF AMERICA,

Appellee,

—against—

DAVID WENGER,

Defendant-Appellant.

Before:

SMITH, FEINBERG AND MULLIGAN,

Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, Harold R. Tyler, Jr., *J.*, denying motion to correct "clerical mistake" under Fed. R. Crim. P. 36.

Affirmed.

ELKAN ABRAMOWITZ, New York, N. Y. (Weiss Bronston Rosenthal Heller & Schwartzman, on the brief) *for Defendant-Appellant.*

WALTER M. PHILLIPS, JR., Assistant United States Attorney (Whitney North Seymour, Jr., United States Attorney for the Southern District of New York; Henry Putzel, III, and Peter F. Rient, Assistant United States Attorneys, on the brief) *for Appellee.*

Appendix A—Opinion of United States Court of Appeals

FEINBERG, *Circuit Judge*:

In April 1970, appellant David Wenger was convicted in the United States District Court for the Southern District of New York, after a jury trial presided over by Harold R. Tyler, Jr., *J.*, of agreeing to receive, and receiving, a bribe as accountant and auditor for a Teamsters Union Pension Fund, 18 U.S.C. §§ 371, 1954. In June 1970, Judge Tyler sentenced Wenger to concurrent sentences of two years and three months on the two counts of his conviction.[1] That conviction was affirmed by this court in April 1971. *United States* v. *Russo*, 442 F.2d 498 (1971). Meanwhile, Wenger had been found guilty of another conspiracy and bribery after a jury trial in the Southern District, this time before Milton Pollack, *J.* In December 1970, Judge Pollack imposed concurrent prison terms of two years on that conviction.[2] Wenger now appeals from an order of Judge Tyler entered November 1, 1971, which denied Wenger's motion under Fed. R. Crim. P. 36 to correct a "clerical mistake" in the district court records regarding Wenger's conviction before Judge Tyler. The claim of a so-called clerical mistake actually raises the substantial issue whether the sentences imposed upon Wenger by Judges Tyler and Pollack amounted to a total of two years and three months or four years and three months. For reasons set forth below, we affirm Judge Tyler's order.

The precise claim made in the Rule 36 motion was that the court's records of the conviction before Judge Tyler should reflect the "fact" that Wenger has been serving Judge Tyler's sentence since January 4, 1971. The argument rests upon the following chain of events. After Judge Tyler imposed sentence in June 1970, Wenger was allowed

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[1] Wenger also received a $5,000 fine on each count.

[2] Wenger also received a $5,000 fine on each count.

to remain on bail while he appealed from that sentence. However, after Judge Pollack imposed sentence in December 1970 on the crimes tried before him, Judge Pollack denied bail pending appeal from that sentence. Wenger then moved in this court for bail, and on January 4, 1971, we denied the motion. On the same day, Wenger surrendered to the marshal to commence his prison term.[3] Wenger argues that when that occurred, he began to serve not only Judge Pollack's sentence, but Judge Tyler's as well. The reasons offered are that the sentences of Judge Tyler and Judge Pollack are concurrent as a matter of law and that surrender on the latter, therefore, commenced service on both. We need deal only with the former claim because appellant seems to concede—and we agree—that unless the sentences are concurrent his case falls.

Appellant argues that the sentences of Judges Tyler and Pollack must be concurrent because Judge Pollack "though aware of Judge Tyler's earlier sentence . . . did not refer to it in imposing his sentence on Wenger. It is well-settled that the lack of reference to an earlier sentence renders the second sentence concurrent to the earlier one."[4] It is true that an all but conclusive presumption does exist in federal sentencing that unless otherwise stated a sentence imposed on a given count or indictment is concurrent with other federal sentences then imposed or previously imposed. See *Borum* v. *United States*, 409 F.2d 433, 439-41 (D.C. Cir. 1967), *cert. denied*, 395 U.S. 916 (1969); 2 Wright, Fed. Practice and Procedure—Crim. § 527, at 420 (1969). This presumption is not universal; various states have different ones. See ABA Project on Minimum Standards for Crim. Justice, Sentencing Alternatives and Procedures § 3.4, at

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[3] The appeal from the conviction before Judge Pollack was subsequently withdrawn.

[4] Appellant's brief at 5.

173-74 (Tent. Draft 1967) [ABA Sentencing]. The federal presumption apparently has never received explicit Supreme Court approval, although as early as 1887 Justice Bradley, sitting as a circuit judge, could say that "by force of law" unless otherwise indicated "each sentence would begin to run at once, and they would all run concurrently." *United States* v. *Patterson*, 29 F. 775, 778 (3d Cir. 1887). Cf. *United States* v. *Daugherty*, 269 U.S. 360, 363 (1925).

We can find only one instance in which this circuit employed the presumption. *United States* v. *Chiarella*, 214 F.2d 838, 841 (2d Cir.), *cert. denied*, 348 U.S. 902 (1954). There the district judge at oral sentencing stated that there would be consecutive sentences on counts 1, 2 and 4, and that the sentence on count 3 would be concurrent with counts 1 and 2. On appeal, counts 1 and 2 were reversed, so the issue (after some unusual procedural steps) was the proper relationship between the sentences on counts 3 and 4. This court held as a matter of law that the two were concurrent.[5]

The purpose of the presumption seems to be that if nothing is specifically indicated, there is no way of knowing whether the sentences are to be concurrent or consecutive, so courts have opted for the shorter sentence, thus placing the burden squarely on the prosecutor and judge to affirmatively suggest and impose the longer sentence. Official inadvertence works in favor of the defendant.[6] In theory

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[5] Judge Harlan dissented on a different ground.

[6] That such an affirmative burden was placed upon courts quite early is reflected in a number of 19th century commentaries on criminal procedure. See 1 J. Bishop, Commentaries on the Criminal Law § 953, at 558-59 (5th ed. 1872):

> When a prisoner, under an unexpired sentence of imprisonment, is convicted of a second offense; or when there are two or more convictions on which sentence remains to be pronounced; *the judgment may direct*, that each succeeding

there could have been a procedure for going back to the sentencing judge to clarify the issue, but the presumption seems to have emerged so early that any such procedure was cut off by the double jeopardy clause prohibiting increases in sentences which have begun to be served. *United States* v. *Benz*, 282 U.S. 304 (1931); *Ex parte Lange*, 85 U.S. (18 Wall) 163 (1873). The continued existence of the presumption would certainly seem to be supported by its simplicity, by the general notion of holding the Government to precision before a defendant can be jailed, and by the apparent desire to minimize consecutive sentences generally. See ABA Sentencing § 3.4(b) and (b)(iv), at 171-72, 179-80.

We have outlined the presumption and its justifications at such length to make clear that we would ordinarily have no quarrel with it. Although *United States* v. *Chiarella*, *supra*, dealt only with counts of the same indictment, we are willing to assume that the presumption applies to sentences imposed upon different indictments at different times. But we are frankly reluctant to apply the presumption here. First, appellant had no misapprehension at all about the sentence imposed by Judge Pollack.[7] Upon the

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> period of imprisonment shall commence on the termination of the period next preceding. . . . [Footnotes omitted; emphasis added.]

See also J. Chitty, A Practical Treatise on the Criminal Law 718, 800 (1816).

[7] Appellant does not dispute that Judge Pollack's unexpressed intention was to impose consecutive sentences. Indeed, on November 17, 1971, after the motion before Judge Tyler was denied and Wenger filed the notice of this appeal, Judge Pollack on his own motion in open court in the presence of counsel explicitly indicated what his intention was:

> I had no intention and, as I think the facts spell out, there was no purpose in my mind that this sentence would

application for bail in this court pending appeal from that sentence, the Government stated:

> It was clearly not an abuse of discretion to deny bail pending appeal in this case. Wenger has previously been sentenced to a term of 27 months for the same charge of accepting a kickback. He is also charged in four other indictments with agreeing to receive a similar payoff. *The total prison sentence he currently faces is four years and three months.* In adddition, Wenger was convicted by a jury in December, 1970 in the Eastern District of New York for income tax evasion, and is awaiting sentence on that conviction. In view of Wenger's involvement with the law and his mounting convictions, Judge Pollack's decision to deny Wenger bail pending appeal was certainly not an abuse of discretion for the reason that there is now a serious likelihood of flight.[8] [Emphasis added.]

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run concurrently with any other sentence which might have been imposed or which this defendant would be subject to by any other Court.

* * * * *

In short, if he has a two year commitment by reason of anything Judge Tyler did which became final well after the time of my commitment of the defendant, then the clear understanding was that he had two years there or a total of four years.

Standing alone, this "clarification" after Wenger started to serve his sentence would be ineffective. See *Borum* v. *United States*, *supra*; *Schultz* v. *United States*, 384 F.2d 374 (5th Cir. 1967); *United States* v. *Sacco*, *supra*. But the judge's statement does highlight that both appellant and the judge had the same understanding of the sentence when imposed.

[8] Government's affidavit in opposition pp. 2-3 (Dkt. No. 35818).

There is no indication that appellant replied that the "total prison sentence" he was then facing was not "four years and three months" but was two years less, even though on an application for bail it would have been in his interest to do so. That appellant had no misunderstanding about his sentences is further confirmed by statements made by his counsel when Wenger appeared not long thereafter for additional sentencing before two other judges—first in April 1971 before Judge Jack B. Weinstein in the Eastern District[9] and then in August 1971 before Judge Charles M. Metzner in the Southern District.[10] At the former, Wenger's counsel stated:

> He now stands, having been setenced twice in the United States District Court for the Southern District of New York to terms of imprisonment which, taken together, total very nearly the maximum provided by statute in this case, something over four years, the maximum here being five.

Before Judge Metzner, the following colloquy occurred:

> The Court: I would like to get clear for the record what the status is of the prison terms previously imposed by Judges Tyler and Pollack.
>
> The record indicates to me that . . . Mr. Wenger was convicted on two counts [before Judge Tyler]...
>
> Mr. Kove: That is correct, your Honor.
>
> The Court: Subsequently, he was convicted on one count—or was it two counts?—before Judge Pollack? It really doesn't make any difference——

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[9] After a jury trial on a charge of income tax evasion. The judgment of conviction was affirmed by this court in January 1972. — F.2d —— (1972).

[10] After pleas of guilty to three separate indictments charging receipt of three more bribes in connection with mortgage loan applications to the Fund.

Mr. Kove: It was two.

The Court: For which *he received two year prison terms to be consecutive with the terms imposed by Judge Tyler?*

Mr. Kove: *That is correct.*

The Court: Do I understand Mr. Wenger is now presently incarcerated?

Mr. Kove: Yes, your Honor.

The Court: And he is serving Judge Pollack's term?

Mr. Kove: Exactly.

The Court: And when that term is finished he will commence the service of Judge Tyler's term?

Mr. Kove: As it stands now, unless some efforts are made to adjust that situation, that is what it is at the present time.

The Court: Even though Judge Pollack's term—the judgment of conviction says it is to be consecutive with Judge Tyler's.

Mr. Kove: Yes, we assumed that, until such time as corrective procedure are made. For all practical purposes——

The Court: *He is facing four years and two months maximum?*

Mr. Kove: *Exactly; that is what he is facing at the present time, realistically.*

* * * * *

Mr. Kove: Now, what I am saying, your Honor, is that four years and three months for these activities—and they are so closely related in time—would be actually cruel and unusual punishment at this stage, because as far as we know Mr. Wenger has time left to serve, and it is becoming more and more destructive to him and to his family. . .

* * * * *

> The Court: Well, I agree that with total sentences of four years and three months that an additional prison term would be uncalled for; but I do think, in view of the fact that money passed in each one of these cases, that fines are in order.[11] [Emphasis added.]

Thus, it is clear beyond a doubt that Wenger knew he had been sentenced to two years and three months by Judge Tyler and two *more* years by Judge Pollack. To insist upon application of the concurrent sentence presumption in the teeth of this fact would be to indulge in sheer ritual. Other courts, in far less compelling situations, have refused to apply the presumption. See, *e.g.*, *Buie* v. *King*, 137 F.2d 495 (8th Cir. 1943); *United States* v. *Remus*, 12 F.2d 239 (6th Cir.), *cert. denied*, 271 U.S. 689 (1926).

Our second reason for being unwilling to apply the general presumption is based on notions of estoppel. As the above colloquies make clear, before two other federal judges Wenger took the position that the first two sentences were consecutive and used that assertion to persuade those judges to impose no further prison terms.[12] This was obvious in the proceeding before Judge Metzner and almost as clear in the one before Judge Weinstein.[13] Yet,

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[11] We note that the record does not reveal what "corrective procedures" counsel for Wenger envisioned at that time. Quite possibly, Judge Metzner thought that a motion for reduction of sentence under Fed. R. Crim. P. 35 would be brought before Judge Tyler.

[12] Both judges fined Wenger and imposed suspended sentences.

[13] Judge Weinstein stated:

> I do not really see the necessity of a further term of incarceration under these circumstances.

The "circumstances," of course, included the statement by Wenger's counsel quoted in the text.

less than a month later, Wenger moved before Judge Tyler to correct "clerical mistakes" in his sentence on the flatly contradictionary theory that as a matter of law Judge Pollack's sentence and Judge Tyler's sentence were concurrent. We need not inquire whether—and we do not suggest that—there was intentional misrepresentation to Judges Weinstein and Metzner. We are willing to accept the explanation of appellant's present counsel that it was the colloquy before Judge Metzner (at which he was present) that caused him to "check the record . . . and discover that Judge Pollack made no reference to Judge Tyler's sentence."[14] The real question is not whether there was good or bad faith but whether a party—even a criminal defendant—can take such absolutely inconsistent positions at about the same time before different federal judges and get the benefit of both. While we can find no direct authority on point, *cf.* 1B Moore, Federal Practice ¶ 0.405[8] (2d ed. 1965), we believe that if there is an intellectually respectable way of preventing such a course of conduct, we should.

When a defendant's own conduct shows that even before he began service of the second sentence he understood it to be consecutive to the first, and that understanding continued for months thereafter, and when a defendant uses that construction of his second sentence to obtain leniency from two other federal judges and thereafter attempts to take a flatly inconsistent position to obtain further advantage, we do not feel justified in applying the general presumption. The sentences are consecutive, not concurrent.

Judgment affirmed.

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[14] Appellant's reply brief at 2 n *.

APPENDIX B

Memorandum of Judge Harold R. Tyler, Jr., dated October 25, 1971

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

68 Cr. 467 HRT

UNITED STATES OF AMERICA,

—against—

DAVID WENGER,

Defendant.

TYLER, *D.J.*

On June 5, 1970, after a jury trial and conviction on two counts, 18 U.S.C. §§ 371 and 1954, defendant Wenger was sentenced to a concurrent term of two years and three months by the undersigned. At the same time, Wenger was reelased on bail of $5,000 pending appeal.

Later, on December 21, 1970, Judge Pollack sentenced Wenger to two years concurrent on two counts after conviction by a jury in another case. Judge Pollack continued Wenger on bail *fixed in that case,* (underscoring added) until January 4, 1971, on which date Wenger, as directed by Judge Pollack, surrendered. At the time when he imposed sentence in that case, indictment No. 69 Cr. 569, Judge Pollack made no reference to the earlier sentence imposed by the writer.

Wenger, assisted by new counsel, now moves ". . . for an order pursuant to Fed. R. Crim. P. 36 correcting the

record herein to reflect the fact that the defendant David Wenger surrendered to the custody of the Attorney-General on January 4, 1971 and that his bail was released on that date." The infirmities of this application, in my view, are significantly reflected in its statement. It must be and is denied.

Initially, I note that there are no clerical mistakes in the judgment of conviction entered by me or any other erroneous orders or errors within the record to which Wenger calls my attention on this motion. In fact, there were no orders, judgments or proceedings in this case that had any relationship whatsoever to Wenger's surrender on January 4, 1971 to begin service of the sentence imposed by Judge Pollack. Thus, as a technical matter, Wenger has no basis upon which to bring a motion before me pursuant to Rule 36, F.R. Crim. P.

Regrettably, for Wenger, this infirmity is far more than a mere technicality. When Wenger surrendered on January 4, 1971, he surrendered to commence serving only Judge Pollack's sentence. There is no record or evidence that he then commenced serving or that he even now is serving the sentence imposed in this case. See 18 U.S.C. § 3568. Moreover, contrary to the argument of Wenger's counsel, the bail terminated by Judge Pollack on January 4, 1971 was the bail fixed in that case and not the bail pending appeal fixed in this case.

Without extended discussion, it is clear that all the legal authorities and arguments raised by Wenger are inapposite to the problem before me. As the papers of both parties indicate beyond a peradventure, the sentence imposed by me was neither illegal nor inadvertent. This motion is denied. It is so ordered.

Dated: October 25, 1971.

HAROLD R. TYLER, JR.
U.S.D.J.

APPENDIX C

Judgment of United States Court of Appeals

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixth day of March one thousand nine hundred and seventy-two.

Present:

HON. J. JOSEPH SMITH,
HON. WILFRED FEINBERG,
HON. WILLIAM H. MULLIGAN,
Circuit Judges

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—v.—

JACK MCCARTHY, JAMES PLUMERI, RUSSO LEONARD, DAVID WENGER,
Defendants,

DAVID WENGER,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel. ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

s/ A. DANIEL FUSARO,
Clerk

APPENDIX D

Order of United States Court of Appeals Denying Rehearing

71-2130

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—v.—

JACK MCCARTHY, JAMES PLUMERI, RUSSO LEONARD, DAVID WENGER,
Defendants,

DAVID WENGER,
Defendant-Appellant.

A petition for a rehearing together with a motion in the alternative to stay the issuance of the mandate pending application for a writ of certiorari to the Supreme Court of the United States having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition for rehearing be and it hereby is denied, and that the petition for a stay of the issuance of the mandate is granted, subject to the provisions of FRAP 41(b).

J. JOSEPH SMITH (WF)
WILFRED FEINBERG
WILLIAM H. MULLIGAN.

April 4, 1972

APPENDIX E

Order of United States Court of Appeals Denying Rehearing En Banc

UNITED STATES COURT OF APPEALS

71-2130

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—v.—

JACK MCCARTHY, JAMES PLUMERI, RUSSO LEONARD, DAVID WENGER,
Defendants,

DAVID WENGER,
Defendant-Appellant.

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant and no active circuit judge having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

s/ HENRY J. FRIENDLY,
HENRY J. FRIENDLY,
Chief Judge

April 4, 1972

APPENDIX F

Judgment of United States District Court dated June 5, 1970

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 68 Cr. 467

UNITED STATES OF AMERICA

—v.—

DAVID WENGER

On this 5th day of June, 1970 came the attorney for the government and the defendant appeared in person and[1] by counsel

IT IS ADJUDGED that the defendant upon his plea of[2] not guilty, and a verdict of guilty by a jury has been convicted of the offense of as an employee of an Employee Pension Benefit Plan, unlawfully, wilfully and knowingly receiving and agreeing to receive money because of, and with intent to be influenced with respect to, his actions, decisions and duties relating to a mortgage application submitted to the Fund, (Title 18, United States Code, Section 1954); unlawfully, wilfully and knowingly conspiring so to do. (Title 18, United States Code, Section 371) as charged[3] in counts 1 and 2 and the court having asked the defendant whether he has anything to say why judgment should not be pronounced and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized

Appendix F—Judgment of United States District Court dated June 5, 1970

representative for imprisonment for a period of [4] Two (2) Years and Three (3) Months on each of counts 1 and 2 to run concurrently with each other and Fined $5,000.00 on each of counts 1 and 2. The defendant is given until July 6, 1970 at 4:00 P.M. to pay the total fine of $10,000.00 or he is to stand committed until the fine is paid or he is otherwise discharged according to law. Defendant is continued on his present bail until June 8, 1970 at 4:00 P.M. to post bail in the sum of $5,000.00 pending appeal.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

H. R. TYLER,
United States District Judge.
JOHN LIVINGSTON,
Clerk.

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[1] Insert "by [name of counsel], counsel" or "without counsel; the court advised the defendant of his rights to counsel and asked him whether he desired to have counsl appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel."

[2] Insert (1) "guilty and the court being satisfied there is a factual basis for the plea," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be.

[3] Insert "in count(s) number " if required.

[4] Enter (1) sentence or sentences, specifying counts, if any; (2) wether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law.

[5] Enter any order with respect to suspension and probation.

[6] For use of Court wishing to recommend a particular institution.

APPENDIX G

Judgment of United States District Court dated December 21, 1970

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 69 Cr. 569

UNITED STATES OF AMERICA

—v.—

DAVID WENGER

On this 21st day of December, 1970 came the attorney for the government and the defendant appeared in person and [1] by counsel, Irving Anolik, Esq.,

IT IS ADJUDGED that the defendant upon his plea of [1] not guilty, and a verdict of guilty by a jury has been convicted of the offense of while an employee of an employee pension benefit plan unlawfully, wilfully and knowingly received money and other things of value because of and with intent to be influenced with respect to his decisions and other duties relating to a mortgage loan application (Title 18, United States Code, Section 1954); unlawfully, wilfully and knowingly conspiring to violate Sections 1952 and 1954 of Title 18, United States Code) (Title 18, United States Code, Section 371) as charged [2] in cts 1 and 4 and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the court,

Appendix G—Judgment of United States District Court dated December 21, 1970

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of [1] Two (2) years and fined $5,000.00 on count 1. Two (2) years and fined $5,000.00 on count 4. Prison sentence on count 4 to run concurrently with the sentence imposed on count 1, Fines totalling $10,000.00 to be paid or the defendant is to stand committed until the fine is paid or he is otherwise discharged according to law.

Defendant is continued on his present bail until January 4, 1971 at 11:00 A.M., at which time he is to surrender to the United States Marshal for service of sentence.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

MILTON POLLACK,
United States District Judge.
JOHN LIVINGSTON,
Clerk.

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[1] Insert "by [name of counsel], counsel" or "without counsel; the court advised the defendant of his rights to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived th right to the assistance of counsel."

[2] Insert (1) "guilty and the court being satisfied there is a factual basis for the plea," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be.

[3] Insert "in count(s) number ————" if required.

[4] Enter (1) sentence or sentences, specifying counts, if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law.

[5] Enter any order with respect to suspension and probation.

[6] For use of Court wishing to recommend a particular institution.